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8 **United States District Court**
9 **Central District of California**
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11 RAUL LEOS, individually and on behalf
12 of all others similarly situated,

13 Plaintiff,

14 v.

15 FEDERAL EXPRESS CORPORATION;
16 and DOES 1 through 25, inclusive,
17 Defendants.

Case No. 2:14-cv-02864-ODW(AGR_x)

**ORDER DENYING MOTION TO
REMAND [19]**

18 **I. INTRODUCTION**

19 This action was removed from the Los Angeles County Superior Court based
20 on diversity jurisdiction under the Class Action Fairness Act (“CAFA”), 28 U.S.C.
21 § 1332(d). Plaintiff Raul Leos moves the Court to remand based on the amount in
22 controversy. (ECF No. 19.) Leos is a former employee of Defendant Federal Express
23 Corporation (“FedEx”). Leos is suing FedEx for violations of Los Angeles and
24 California wage-and-hour laws on behalf of himself and a putative class of current and
25 former employees. In the Motion, Leos disputes only CAFA’s \$5 million amount-in-
26 controversy requirement, and alternatively requests a stay of proceedings pending the
27 outcome in *Dart Cherokee Basin Operating Co. v. Owens*, 134 S. Ct. 1788 (2014).
28 The Court finds that FedEx has met its evidentiary burden in establishing that the

1 amount in controversy exceeds \$5 million and accordingly **DENIES** Leos's Motion to
 2 Remand.¹ (ECF No. 19.) Further, because the Court finds that FedEx has provided
 3 evidence sufficient to establish amount in controversy, it declines to stay the
 4 proceedings.

5 **II. FACTUAL BACKGROUND**

6 On February 6, 2014, Leos filed the class-action Complaint in Los Angeles
 7 County Superior Court, followed by the First Amended Complaint on March 12,
 8 2014. Leos alleges that FedEx failed to pay him and other putative class members the
 9 appropriate wages under the applicable Los Angeles ordinance and to timely pay
 10 wages due upon discharge or resignation, as well as failure to furnish accurate wage-
 11 and-hour statements. (ECF No. 1, Ex. B ("FAC").) Leos raises only state-law claims.
 12 Leos defines the putative class members as,

13 [Leos] and all similarly situated individuals who work or have worked
 14 for Defendant in California at the Los Angeles World Airports
 15 ("LAWA") as a Material Handler, or any similar positions whose duties
 16 include the handling, sorting, and loading of cargo and baggage, at any
 17 time during the four years preceding the filing of the action and
 18 continuing while the action is pending, who were denied the benefits and
 19 protections required under the Living Wage Ordinance set forth in the
 20 Los Angeles Administrative Code, and various provisions of the
 21 California Labor Code and other statutes and regulations applicable to
 22 California employees.

23 (FAC ¶ 1.)

24 FedEx removed this action on April 14, 2014, on the basis of diversity
 25 jurisdiction under CAFA. (ECF No. 1. ("Notice of Removal").) On May 19, 2014,
 26 Leos filed the present Motion to Remand, alleging that FedEx's Removal was based
 27

28 ¹ After carefully considering the papers filed in support of and in opposition to the Motion, the Court
 deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

1 on speculation and self-serving assumptions. (ECF No. 19.) FedEx timely opposed.
 2 (ECF No. 24 (“Opp’n”).) FedEx supports its Opposition with declarations from John
 3 T. Lopinsky, a FedEx Payroll Advisor; Todd J Fuglseth, a FedEx Human Resources
 4 Advisor; Venytra C. Harris, a FedEx Human Resources Business Analyst in the
 5 Human Resources Department; and Dane Worley, a Senior Manager in the Los
 6 Angeles Regional HUB. Leos’s Motion is now before the Court for decision.

7 **III. LEGAL STANDARD**

8 Federal courts are courts of limited jurisdiction, having subject-matter
 9 jurisdiction only over matters authorized by the Constitution and Congress. *See, e.g.,*
 10 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A suit filed in
 11 state court may be removed to federal court if the federal court would have had
 12 original jurisdiction over the suit. 28 U.S.C. § 1441(a). A removed action must be
 13 remanded to state court if the federal court lacks subject-matter jurisdiction. 28
 14 U.S.C. § 1447(c).

15 Subject-matter jurisdiction exists in civil cases involving a federal question or
 16 diversity of citizenship. 28 U.S.C. §§ 1331, 1332. Under CAFA, federal district
 17 courts have original jurisdiction to a hear a class action if the proposed class has
 18 (1) more than 100 members, (2) the parties are minimally diverse, and (3) the amount
 19 in controversy in the aggregate exceeds the sum or value of \$5 million. 28 U.S.C.
 20 § 1332(d)(2), (d)(5)(B); see also *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345,
 21 1348–49 (2013). In removal cases, the removing party bears the burden of proving
 22 subject-matter jurisdiction under CAFA by a preponderance of the evidence.
 23 *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 977 (9th Cir. 2013).

24 **IV. DISCUSSION**

25 Neither party disputes the first two requirements of CAFA jurisdiction—the
 26 purported class has more than 100 members and there is minimal diversity. The
 27 parties only dispute whether FedEx has met its burden on removal of establishing that
 28 the amount in controversy exceeds \$5 million. Specifically, Leos alleges that FedEx

1 has not provided sufficient evidence in support of the amount in controversy, and that
 2 FedEx erred when using the 100-percent violation rule in its calculation of the amount
 3 in controversy.

4 **A. Sufficiency of Evidence for CAFA Amount-In-Controversy**

5 Leos moves to remand the case on the grounds that FedEx has not provided
 6 sufficient evidence to establish that the amount in controversy exceeds \$5 million. In
 7 determining the amount in controversy for subject-matter jurisdiction, federal district
 8 courts look to the complaint. *Singer v. State Farm Mut. Auto. Ins. Co.* 116 F.3d 373,
 9 376 (9th Cir. 1997) (citing *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th
 10 Cir.1995)). If the amount in controversy is not facially apparent in the complaint, the
 11 Court may consider the removal petition and any “summary-judgment-type evidence
 12 relevant to the amount in controversy at the time of removal,” similar to a review
 13 under Federal Rule of Civil Procedure 56. *Id.*; accord *Korn v. Polo Ralph Lauren*
 14 *Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008). Summary-judgment-type
 15 evidence includes “materials in the record, including . . . affidavits and
 16 declarations[.]” Fed. R. Civ. P. 56(c)(1). Further, the removing party is not required
 17 to provide extensive business records in order to establish the amount in controversy.
 18 *Muniz v. Pilot Travel Ctrs. LLC* No. CIV.S-07-0325 FCB EFB, 2007 WL 1302504, at
 19 *5 (C.D. Cal. May 1, 2007).

20 Leos makes seven claims for violations of California and Los Angeles wage-
 21 and-hour laws. Leos does not specify the amount in controversy in the Amended
 22 Complaint. (*See generally* FAC) Because the amount in controversy is not specified,
 23 FedEx has the burden of establishing by a preponderance of the evidence that the
 24 amount in controversy exceeds \$5 million. *Rodriguez*, 728 F.3d at 977. Leos argues
 25 that FedEx has not met its burden in that it has failed to provide actual evidence of the
 26 amount in controversy and instead has relied on speculation and self-serving
 27 assumptions. In the Notice of Removal, FedEx initially asserted that the amount in
 28 controversy for Leos’s first and second causes of action and applicable attorney fees is

1 \$6.5 million. (Not. of Removal ¶ 25.) FedEx has since adjusted the figure to
2 \$7,035,783.96, which includes figures for Leos's third and fourth causes of action as
3 well. (Opp'n 11-12.)

4 Leos contends that the figures asserted by FedEx in the Notice of Removal are
5 speculative and based on self-serving assumptions rather than on evidence. The
6 Notice of Removal used a calculation method that assumes a 40-hour work week for
7 52 weeks per year with no absences. (Not. of Removal 7 n.3.) Further, the
8 assumptions used in the Notice of Removal are not based on any supporting
9 declaration. (*See generally id.*) Further, the class is assumed to be 100 members,
10 which is used "for purposes of calculation" (*id.* at 7 n.4.), and again was not supported
11 by any declaration of any FedEx employee competent to make such statement.

12 However, the Court is permitted to look at "summary-judgment-type evidence"
13 in determining amount in controversy for purposes of removal under CAFA, *Singer v.*
14 *State Farm Mut. Auto. Ins. Co.* 116 F.3d 373, 376 (9th Cir. 1997) (citing *Allen v. R &*
15 *H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir.1995)), and therefore may look to FedEx's
16 Opposition for such evidence. FedEx provides a much more comprehensive analysis
17 in establishing the amount in controversy in the Opposition, and accordingly, the
18 Court finds that FedEx has met its burden of establishing by preponderance of the
19 evidence that the amount in controversy exceeds \$5 million.

20 In his Reply to FedEx's Opposition, Leos contends that the Declarations of
21 Todd J. Fuglseth, Venytra C. Harris, Dane Worley, and John T. Lopinsky are
22 inconsistent and again are based on self-serving assumptions. (Reply 1-4.)

23 First, Leos argues that the number of putative class members ascertained by
24 Harris is inconsistent with the number of putative class members used by Lopinsky.
25 (Reply 2.) Harris declares that "2086 employees held the position of Handler (DOT
26 and Non-DOT), Freight Handler or Material Handler" from January 19, 2010, until
27 February 7, 2014. (Harris Decl. ¶ 4.) In calculating the average hourly rate of the
28 putative class members, Lopinsky used a "list of 2052 current and former employees

1 of FedEx” that he understood made up the putative class. (Lopinsky Decl. ¶ 4.)
 2 Additionally, Leos argues that Fuglseth also used a purported list of putative class
 3 members to determine how many had opted out of healthcare² but did not indicate the
 4 source or number of total putative class members he used. (Reply 2–3.)

5 Although the Court recognizes that there are inconsistencies in the number of
 6 putative class members used in the calculations by FedEx employees, the
 7 inconsistencies are not fatal. The difference in putative class members is 34
 8 employees, which the Court does not see as significant. In calculating the amount in
 9 controversy, FedEx used the number of employees who had declined healthcare—205
 10 employees—rather than either 2086 or 2052. At roughly ten percent of the putative
 11 class, 205 employees is a significantly smaller subset than the putative class as a
 12 whole. Fuglseth determined that 205 employees out of either 2086 (9.8 percent) or
 13 2052 (10 percent) had declined healthcare, and the Court does not find this difference
 14 significant.

15 Leos would like the Court to find that all of the numbers are unreliable, but the
 16 Declarations of Fuglseth, Harris, and Lopinsky are declarations of a Human Resources
 17 Analyst, a Human Resources Business Analyst, and a Payroll Advisor, respectively.
 18 All of the declarants have personal knowledge of the facts in their declarations, and all
 19 of the declarants have routine familiarity with retrieving and analyzing the data in
 20 their declarations. The Court finds their declarations persuasive.

21 Next, Leos attacks Los Angeles Regional HUB Senior Manager Dane Worley’s
 22 declaration that “he oversees ‘a work group . . . made up of handlers’” as vague,

23
 24 ² The Los Angeles Living Wage Ordinance requires employees to be paid according to whether they
 25 have opted into or out of healthcare programs provided by the employer. City of L.A., Current and
 26 Prior Living Wage Rates for Airport Employees (2013), *available at* [http://www.lawa.org/
 27 uploadedFiles/LAWA/pdf/Current_and_Prior_Living_Wage_Rates_2013.pdf](http://www.lawa.org/uploadedFiles/LAWA/pdf/Current_and_Prior_Living_Wage_Rates_2013.pdf). Because Leos opted
 28 out of healthcare, FedEx used the subset of those who opted out of healthcare in calculating the
 amount in controversy in order to provide a “conservative, good faith calculation of damages.”
 (Opp’n 9.) At 205 employees, this subset meets the \$5 million amount-in-controversy
 requirement—so the class as a whole would certainly exceed the requirement with more than 2000
 members.

1 because Worley does not indicate the size of the group, nor does he indicate whether
2 all class members worked the average of 20 hours per week. Leos' argument is
3 without merit. Worley's declaration actually states the he is a "Senior Manager over a
4 work group at the Los Angeles Regional HUB primarily made up of handlers, and [he
5 is] familiar with their scheduled work hours." (Worley Decl. ¶ 2.) The Court reads
6 this statement to mean that Worley oversees handlers in the Los Angeles Regional
7 HUB and some other workers, which would necessarily include handlers who are
8 putative class members. This is not a matter of FedEx being vague, but of Leos's
9 misguided logic. Further, Worley also indicates that the handlers in his group—not
10 the entire group—work an average of 20 hours per week. (Worley Decl. ¶ 3.) The
11 Court finds that Worley's declaration is sufficiently specific and informative.

12 Lastly, Leos argues that Harris and Worley do not support their use of
13 "handlers" (Worley Decl. ¶ 2-3.), and "Handler (DOT and Non-DOT), Freight
14 Handler and Material Handler" (Harris Decl. ¶ 4.), with any evidence or proof that the
15 employees are members of the purported class. However, Leos indicates that the class
16 is comprised by "[a]ll individuals employed by, or formerly employed by, Defendant
17 at the Los Angeles World Airports in the State of California as a Material Handler (*or*
18 *any similar positions whose duties include the handling, sorting, and loading of cargo*
19 *and baggage*)" (FAC ¶ 24 (emphasis added).) Because the Amended Complaint
20 explicitly mentions Material Handlers, it is clear that Material Handlers are putative
21 class members. Additionally, because the Amended Complaint refers to any other
22 employees whose tasks include "handling, sorting, and loading of cargo and baggage,"
23 the Court can confidently infer that "handlers" handle and that "Freight Handlers"
24 handle things like cargo. The Court is not quite as mystified by the inclusion of other
25 employees that meet the requirements in Leos's own Amended Complaint as Leos
26 himself seems to be.

27 Additionally, the Court finds that FedEx bases its Opposition on sufficient
28 evidence to support the conclusion that it has established the amount in controversy by

1 a preponderance of the evidence. The number of hours worked per week is based on
 2 consultation with Worley, who is Senior Manager of the Los Angeles Regional HUB.
 3 The average pay rate of \$14.13 per hour was determined by Lopinsky, who is a
 4 Payroll Advisor and was higher by \$0.46 than the amount paid to Leos himself—a
 5 figure which would seem to defeat the argument that the average pay rate used is self-
 6 serving. Further, as discussed above, the number of employees used in calculations
 7 includes only members of the putative class who opted out of healthcare, and is one-
 8 tenth that of the putative class members. This figure is based on consultation with
 9 Fuglseth, who is a Human Resources Advisor working in FedEx’s Benefits
 10 Department. Accordingly, the Court finds that the evidence provided in the Response
 11 is based on sufficient factual data and supported by declarations of employees with
 12 personal knowledge.

13 **B. 100-Percent Violation Rule**

14 In determining the amount in controversy, the Court “must assume that the
 15 allegations of the complaint are true and that a jury will return a verdict for the
 16 plaintiff on all claims made in this complaint.” *Roth v. Comerica Bank*, 799 F. Supp.
 17 2d 1107, 1117 (C.D. Cal. 2010) (citations omitted) (quoting *Kenneth Rothschild Trust*
 18 *v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002)). With
 19 respect to statutory penalties, a plaintiff may not “avoid satisfaction of the amount in
 20 controversy by arguing that the class plaintiffs may be awarded less than the statutory
 21 maximum.” *Korn*, 536 F. Supp. 2d at 1206 n.4. Similarly, courts have assumed a
 22 100-percent violation rate where the complaint does not allege facts specific enough to
 23 “narrow the scope of the putative class or the damages sought.” *Coleman v. Estes*
 24 *Express Lines, Inc.*, 730 F. Supp. 2d 1141, 1150 (C.D. Cal. 2010) (quoting *Muniz*,
 25 2007 WL 1302504, at *4).

26 However, parties may not rely on the assumption that the 100-percent violation
 27 rule applies without supporting the assumption with evidence. *Garibay v. Archstone*
 28 *Cmtys. LLC*, 539 Fed. App’x 763 (9th Cir. 2013). Additionally, courts have “rejected

1 the unsupported use of 100% maximum violation rates.” See *Emmons v. Quest*
2 *Diagnostics Clinical Labs, Inc.*, No. 1:13-cv-0474 AWI-BAM, 2014 WL 584393, at
3 *5 (E.D. Cal. Feb. 12, 2014) (citing *Weston v. Helmerich & Payne Int’l Drilling Co.*,
4 No. 1:13-cv-01092-LJO-JLT, 2013 WL 5274283, at *5–6 (E.D. Cal. Sept. 16,
5 2013)).

6 In contrast, courts have allowed the assumption of a 100-percent violation rate
7 where the plaintiff alleges in the complaint that each member of the class has been
8 harmed. *Coleman*, 730 F. Supp. 2d at 1149. Similarly, courts have determined that in
9 calculating amount in controversy, the average wage of the class members is an
10 appropriate rubric for assessing wages as well as penalties based on wage-and-hour
11 violations. *Id.* at 1150 (quoting *Helm v. Alderwoods Grp., Inc.*, No. C 08-01184 SI,
12 2008 WL 2002511, at *4 n.3 (N.D. Cal. May 7, 2008)).

13 Leos’s third claim in the Amended Complaint is for violation of California
14 Labor Code section 226. Leos claims that “Class Members are entitled to all available
15 statutory penalties . . . provided in California Labor Code section 226(e).” (FAC ¶
16 52.) California Labor Code section 226(e) provides that provision of inadequate
17 wage-and-hour statements entitles each affected employee to up to a \$4000 statutory
18 maximum penalty. Leos urges the Court to apply *Garibay*, in which the Ninth Circuit
19 remanded a case because the evidence supporting the amount in controversy in the
20 Notice of Removal was based on assumptions.

21 In *Garibay*, the removing party attempted to base removal on the assumption
22 that every putative class member would be entitled to recover damages for inadequate
23 wage-and-hour statements for every single pay period but did not support these
24 assumptions with specific facts. The Ninth Circuit found the removing party could
25 not calculate the amount in controversy by using the 100-percent violation rule,
26 because the removing party had not provided any evidence that each putative class
27 member had been so harmed, and that assumptions were inadequate to support the use
28 of the 100-percent violation rule.

1 But here, the gravamen of Leos's claims is that FedEx willfully deprived its
 2 employees of adequate wages under Los Angeles's Living Wage Ordinance ("LWO").
 3 In *Garibay*, the employer may have provided inaccurate wage-and-hour statements,
 4 but the court concluded that it was not necessarily the case that each and every pay
 5 statement was inadequate. In contrast, Leos alleges that FedEx did not "[pay] in full
 6 for all hours worked, including overtime, among other things. [FedEx] applied this
 7 illegal wage device *uniformly to all Class Members All who were subject to this*
 8 *unlawful compensation scheme suffered damages.*" (FAC ¶ 27 (emphasis added).)

9 Leos goes further, alleging that all class members were not provided with
 10 adequate wage-and-hour statements "since the amount paid by [FedEx] did not
 11 correspond to the amounts required by the LWO." (FAC ¶ 28.) Where all members
 12 were damaged due to inadequate compensation, and therefore all were given
 13 inadequate wage-and-hour statements, it follows that all are subject to calculation in
 14 assessing statutory penalties under California Labor Code section 226(e). The Court's
 15 analysis is consistent with *Garibay*, in that the removing party in *Garibay* relied on
 16 the assumption of a 100-percent violation rate to calculate statutory damages, where
 17 here, FedEx has relied on the specific and explicit allegation in the Complaint that
 18 each and every class member received inadequate wage-and-hour statements. As the
 19 Court in *Roth* explained, the court "must assume that the allegations of the complaint
 20 are true and that a jury will return a verdict for the plaintiff on all claims made in this
 21 complaint." 799 F. Supp. 2d at 1117 (quoting *Kenneth Rothschild Trust*, 199
 22 F.Supp.2d at 1001).

23 The same line of analysis applies for the alleged statutory penalties under
 24 California Labor Code sections 201–03. In the Amended Complaint, Leos alleges that
 25 FedEx "failed to pay accrued wages and other compensation due immediately to each
 26 Class Member who was terminated and failed to pay accrued wages within 72 hours to
 27 each Class Member who ended his or her employment." (FAC ¶ 54.) Leos may not
 28 allege that all class members who were terminated or ended their employment are

1 harmed and then claim foul when FedEx uses all such class members in assessing
 2 statutory damages. FedEx ascertained the number of employees who had left
 3 employment during the applicable time to be 729 employees. (Opp'n 12; Harris Decl.
 4 ¶ 4.) FedEx then used this number to assess statutory damages under California Labor
 5 Code section 203 by multiplying the number of employees terminated by the average
 6 wage rate, the average hours per day over 30 days—as the section provides. FedEx
 7 used an appropriate method of discerning the number of employees terminated, and
 8 according to the Amended Complaint, “*each* Class Member who was terminated and .
 9 . . . *each* Class Member who ended his or her employment” was affected by FedEx’s
 10 alleged misdeeds. The Court finds that FedEx’s calculations were not based on
 11 assumptions like the ones in *Garibay*; rather they were based on concrete numbers
 12 provided by a Human Resources Analyst and on Leos’s own specific allegation that
 13 all class members were so affected.

14 V. CONCLUSION

15 The Court finds that FedEx has established by a preponderance of the evidence
 16 that the amount in controversy exceeds \$5 million. The Court therefore has CAFA
 17 class-action jurisdiction over Leos’s action and thus **DENIES** his Motion to Remand.
 18 (ECF No. 19.) Further, because the Court finds that FedEx has met its evidentiary
 19 burden, it declines to stay the proceedings pending the outcome of *Dart Cherokee*
 20 *Basin Operating Co. v. Owens*, 134 S. Ct. 1788 (2014).

21 **IT IS SO ORDERED.**

22
 23 June 10, 2014



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 25 **OTIS D. WRIGHT, II**
 26 **UNITED STATES DISTRICT JUDGE**
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